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NELSON COUNTY *v.* LOVING.SAME *v.* LEA et al.

Nov. 20, 1919.

[101 S. E. 406.]

1. Constitutional Law (§ 29*)—Constitutional Provision as to Compensation Self-Executing.—Owner's right to compensation for property taken or damaged for public use under Const. 1902, § 58, was not affected by absence of statutes providing for assessment of damages by condemnation proceedings, under 3 Pollard's Code 1910, § 994a, subds. 2, 3; the constitutional provision being self-executing.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 156.]

2. Counties (§ 208*)—Consent of State to Sue County for Personal Injuries.—A county, as a political subdivision of the state, cannot be sued for personal injuries without the consent of the state.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 690.]

3. Eminent Domain (§ 70*)—Compensation for Damages to Property.—Const. 1902, § 58, providing that no "private property shall be taken or damaged for public uses without just compensation," held to expressly confer upon all private owners of property the right to just compensation upon its being damaged for public use by the action of the county under the various statutes authorizing such action in so far as the manner of doing or letting the work to contract, etc., is concerned.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 88.]

4. Eminent Domain (§ 271*)—Remedy by Recovery of Damages.—Under Const. 1902, § 58, and Code 1904, §§ 802, 834, subd. 2, and sections 838, 840, 843, owner of land damaged by construction and grading of road by county had, by necessary implication, the right to sue county for damages sustained by presenting claims to board of supervisors and appealing from disallowance of claims.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 114.]

5. Eminent Domain (§ 270*)—Remedy by Action on Implied Contract for Damages to Property.—Owner whose land has been damaged by grading of road by county may waive the tort and sue county in assumpsit on implied contract to make just compensation to owner for private property damaged for public use under Const. 1902, § 58.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 114.]

6. Trial (§ 260 (1)*)—Instructions.—Refusal to give requested instructions merely elaborating proposition of law stated by given instruction was not error.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 604.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

7. Eminent Domain (§ 303*)—Measure of Damages to Realty Injured by Grading of Road.—In action for damages to land from grading of road, where the gravamen of the action is damage to the realty itself, and not the damage suffered in the use and occupation of the property, the measure of damages is the injury to the market value of the property when due consideration has been given to benefits conferred.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 91.]

8. Appeal and Error (§ 1033 (5)*)—Error Favorable to Plaintiff in Error.—Party who asks for and obtains instruction cannot be heard to complain upon writ of error that the instruction was more favorable to it than it should have been.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 608.]

9. Eminent Domain (§ 307 (3)*)—Damages to Land from Grading of Road.—In action against county for damage to land from grading of road, requested instruction held misleading in that it might have been construed by jury as forbidding them to consider any personal inconvenience to owner caused by change of grade, though such inconvenience was a special injury which naturally would have affected market value of the property.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 93.]

10. Eminent Domain (§ 303*)—Cost of Steps and Retaining Walls to Be Considered in Damages from Grading of Road.—In action against county for damage to land from grading of road, the cost of erecting steps and retaining walls made necessary by change in grade were elements to be considered, not as separate items of damages, but as elements, taken together with such other elements of damage, as tended to show whether the property had been depreciated in market value.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 91.]

11. Appeal and Error (§ 171 (1)*)—Theory of Cause Below.—Where case is tried and presented to appellate court on assumption of certain fact, it will be taken as a concluded fact by the appellate court.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 576.]

Error to Circuit Court, Nelson County.

Actions by J. O. Loving and by L. L. Lea and another against Nelson County. Judgments for plaintiffs, and defendant brings error. Affirmed.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.